IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

NO. 83-6318

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SUPREME COURT, U.S.

JAMES FLOWERS

Petitioner

VERSUS

STATE OF LOUISIANA

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF LOUISIANA

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February 16, 1984

TABLE OF AUTHORITIES

PAGE

Dutton v. Evans 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed. 2d 213.....

Washington v. Strickland 673 F 2d 879, 891 (5th Cir.1982) cert granted, U.S. , 103 S.Ct. 2451, 77 L.Ed. 1332 (1983).....

Favre v. Henderson 464 F. 2d 359 (5th Cir.1972).....

State v. Felde 422 So. 2d 370 (La.1982).....

State v. Flowers 441 So. 2d 707 (La.1983), reh'g. denied, So. 2d (La.1983).....

State v. Willie 410 So. 2d 1019 (La.1982).....

STATUTES

28 U.S.C. sec. 1257 (3).....

La. Supreme Court Rule 7, Section 6.....

CONSTITUTIONAL PROVISIONS

Sixth Amendment, United States Constitution.....

Article 1, Section 13, Louisiana State Constitution.....

TABLE OF CONTENTS

	PAGE
Questions Presented.....	1
Citation to Opinions Below.....	2
Jurisdiction.....	2
Constitutional and Statutory Provisions Involved.....	3
Statement of the Case	
A. Course of the Proceedings.....	3
B. Facts Relevant to Questions Presented.....	3
C. How the Federal Questions Were Raised and Decided Below.....	4
Reasons for Granting the Writ.....	4
I. (A) THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FAILURE OF COURT APPOINTED COUNSEL TO OBJECT TO THE ADMISSIBILITY OF DEVASTATING EVIDENCE WHICH IS CLEARLY OBJECTIONABLE HEARSAY AMOUNTS TO A DEPRIVATION OF THE CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, AND TO CONFRONT WITNESSES. WASHINGTON V. STRICKLAND 673 F 2d 879, 891 (5th Cir.1982) CERT. GRANTED, __U.S.___,103 S.Ct. 2451, 77 L.ED. 1332 (1983); DUTTON V. EVANS 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed. 2d 213.	
(B) THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FAILURE OF COURT APPOINTED APPELLATE COUNSEL TO BRIEF THE ISSUES BEFORE THE LOUISIANA SUPREME COURT AMOUNTED TO A DEPRIVATION OF THE EFFECTIVE ASSISTANCE OF COUNSEL.	
Conclusion.....	9
Appendices	

Appendix 1 - Opinion of the Louisiana Supreme Court affirming Mr. Flowers' conviction and death sentence.

Appendix 2 - Opinion of the Louisiana Supreme Court granting petitioner's motion to rule for rehearing out of time and denial of said motion.

Appendix 3 - U.S. Supreme Court Order extending petitioner's time to file a petition for certiorari to February 16, 1984.

Appendix 4 - Warrant For Execution of Person Condemned.

Appendix 5 - Louisiana Supreme Court corrected order staying execution pending timely filing and final disposition of the petition for certiorari in the U.S. Supreme Court.

Appendix 6 - Appeal brief from the trial court conviction and sentence to the Louisiana Supreme Court.

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QUESTIONS PRESENTED

1. Was the defendant denied the constitutional right to effective assistance of counsel under Washington v Strickland 673 F 2d 879,891 (5th Cir.1982) cert. granted, ____U.S._____,103 S.Ct. 2451, 77 L.Ed. 1332 (1983):

   a) Where his court appointed trial lawyer failed to object to the admissibility of devastating hearsay evidence of an anonymous tip implicating the defendant in the crime?

   b) Where the defendant's second court appointed lawyer failed to brief the relevant issues before the Louisiana Supreme Court?

IN THE

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NO. 83-

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VERSUS

STATE OF LOUISIANA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

Petitioner, James Flowers, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana in this case.

CITATION TO OPINIONS BELOW:

The opinion of the Louisiana Supreme Court affirming Mr. Flowers' conviction and death sentence is reported at 441 So. 2d. 707 (La.1983) and is submitted herewith as Appendix 1.

The opinion of the Louisiana Supreme Court granting petitioner's motion to file for rehearing out of time and denial of said motion is cited at reh'g. denied, ___ So. 2d. ___ (La.1983) and appears as Appendix 2.

JURISDICTION:

Jurisdiction of this Court is invoked under 28 USC 1257 (3). The opinion of the Louisiana Supreme Court was rendered on September 2, 1983 and rehearing was denied on November 18, 1983. On January 9, 1984 Justice Byron R. White

entered an order extending petitioner's time to file this petition to and including February 16, 1984 which appears as Appendix 3.

CONSTITUTIONAL PROVISIONS INVOLVED:

This case invokes the Sixth Amendment to the Constitution of the United States which provides in relevant part:

> In all criminal prosecutions the accused shall enjoy the right .... to be confronted with the witnesses against him;.... and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE:

Course of Proceedings

Petitioner James Flowers was convicted of first degree murder in the Twenty Fourth Judicial District Court for Jefferson Parish, Louisiana on February 5, 1982. The jury recommended that petitioner be put to death. On February 25, 1982 petitioner was sentenced to death by execution.

The Supreme Court of Louisiana affirmed the petitioner's conviction and sentence on September 2, 1983 and rehearing was denied on November 18, 1983. The petition for rehearing was filed out of time. On January 9, 1984, Justice Byron R. White entered an order extending petitioner's time to file this petition to and including February 16, 1984. On January 25, 1984, the trial court signed a death warrant ordering execution to take place on March 26, 1984, attached hereto as Appendix 4. On January 26, 1984, the Louisiana Supreme Court ordered a stay of all proceedings pending timely filing and final disposition of this petition, attached hereto as Appendix 5.

FACTS MATERIAL TO QUESTIONS PRESENTED:

I. (A) INEFFECTIVE ASSISTANCE OF APPOINTED TRIAL COUNSEL - THE HEARSAY EVIDENCE

Evidence was presented at trial that on the day after the murder of the victim, the Gretna police department received an anonymous tip that evidence from the murder/burglary could be found in a small white car being driven by James Flowers, on Jefferson Street. Patrolman Glen Michel testified that based on the tip, which he received as a dispatch on his radio, he apprehended James Flowers in a small white car, with evidence from the burglary/murder. This hearsay evidence came into trial without objection, and in fact was referred to as early as the State's opening argument. It was

again referred to in Officer Michel's testimony, the State's closing argument, and even the defendant's closing argument.

(B) INEFFECTIVE ASSISTANCE OF APPOINTED APPELLATE COUNSEL - FAILURE TO BRIEF THE ISSUES

The court appointed trial attorney withdrew after the trial of this matter. The Court appointed Martha Sassone, staff attorney for the Indigent Defender Board of Jefferson Parish to represent Mr. Flowers. Ms. Sassone filed an appeal brief on behalf of Mr. Flowers citing and briefing only one assignment of error, attached hereto as Appendix 6. Thereafter, counsel failed to file a timely petition for rehearing.

HOW THE FEDERAL QUESTIONS WERE DECIDED BELOW:

The Louisiana Supreme Court failed to review the issues of effective assistance of counsel because due to the lack thereof said issue was not before them. However, the Louisiana Supreme Court had the power to review the issue of whether the evidence of the anonymous tip should have been allowed, despite defense counsel's failure to object and appellate counsel's failure to assign error thereto. State v. Willie 410 So.2d 1019, 1036 & n. 4 (La. 1982) (Lemmon, J. concurring).

REASONS FOR GRANTING THE WRIT

I. (A) THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FAILURE OF COURT APPOINTED COUNSEL TO OBJECT TO THE ADMISSIBILITY OF DEVASTATING EVIDENCE WHICH IS CLEARLY OBJECTIONABLE HEARSAY AMOUNTS TO A DEPRIVATION OF THE CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, AND TO CONFRONT WITNESSES.

James Flowers was entitled to the effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article 1, Section 13 of the Louisiana Constitution. This amendment also includes the right to confront witnesses. Louisiana requires that counsel "meet the level of competency normally demanded in criminal cases." State v. Felde 422 So.2d 370, 393 (La.1982). The Fifth Circuit's standard of competence requires that counsel be "reasonably likely to render and rendering effective assistance." (Emphasis on original). Washington v. Strickland 673 F. 2d 879,891 (5th Cir. 1982), cert. granted, _____ U.S. _____, 103 S.Ct. 2451, 77 L. Ed. 1332

(1983).

In the present case, there was no evidence to link James Flowers to the crime prior to the anonymous tip. This tip was telephoned in to the Gretna police office to one officer, who relayed it to another officer, who dispatched it to Officer Michel. (TR. Vol III, pp. 524-526) Evidence of this tip was directly alluded to by the State in its opening argument.

BY THE STATE:

> Therfore, the State's case is entirely circumstantial but the State will show that on October the 24th at or around 4:10 p.m. based on an anonymous tip to the Gretna Police Department, Patrolman Glen Michel proceeded into the area of Madison and Hamilton, which is one block away from 1500 Jefferson Street, in Gretna, Louisiana, to check out a small white Chevette-type car where he was lead to believe that the driver would be an individual by the name of James Flowers.
>
> He did so. A car was in the neighborhood. He stopped James Flowers. And in that car was evidence; was jewelry, costume jewelry and evidence that was taken from 1500 Jefferson Street, which belonged to Madeline Malmstrom. (TR. Vol.III, p. 594, lines 10-23)

Thereafter, the existence of the tip was testified to by Officer Michel.

BY THE STATE:

Q. Did you detain James Flowers?

A. Yes sir, I did.

Q. Okay. Where was he detained?

A. I brought him to the Gretna Police complex, 200 5th Street.

Q. Okay. Why was he detained?

A. I took some jewelry out of a vehicle he was driving that could have possibly be involved in murder that happened the day before at 1500 Jefferson Street.

Q. Okay. And how were you informed of the fact that he would be in the 1500 block of uh, or in the area of Jefferson —

Madison?

A. I received a call over the police radio advising me that there was a black male subject named James Flowers driving a small white--either a Chevette I mean, Chevy or a Mercury, would be in the 1500 block, well the 1500 block area of Jefferson Street, and he's possibly have some evidence involved in a murder homi--a murder/burglary that happened the day before. (TR. p. 679, lines 16-29 & p. 680, lines 1-6)

Prior to the above testimony, defense counsel attempted to object to the introduction of the foregoing evidence but his objection was incorrectly based on leading questions. (TR. Vol. III, pp. 677-679). Defense counsel at no time voiced a hearsay objection to the evidence of the tip. Defense counsel failure to object to the introduction of this evidence served to bolster the identification of Flowers, and to establish his guilt. In FAVRE V. HENDERSON 464 F. 2d 359 (5th Cir. 1972), the Fifth Circuit was confronted with a similar issue. There, the police officer testified that he received information from informants who had proven reliable in the past, which information caused the defendants to be surveilled and later arrested. In a habeas proceeding, the Fifth Circuit upheld the District Court's granting of the habeas writ stating that the testimony of the police officer had denied the defendant his right to confront witnesses. The Court stated at page 361:

> The only reasonable inference to be drawn from the police officer's testimony was that informers had some reason to believe Favre guilty. Those informants thus served as out of court declarants against the defendant.

The Court further stated at page 362:

> Inherent in the testimony, which may have been offered only to establish identification, was an assertion by an out-of-court declarant as to guilt. By saying, "Favre committed the crime," the out of court declarant said (1) Favre committed the crime (identification) and (2) Favre committed the crime (guilt).[1]

In the case at bar, the only reasonable inference to be drawn from the police officer's testimony was that the informant had a reason to believe Flowers was guilty. The most incriminating evidence against Flowers therefore came under the guise of an unknown witness whose credibility could not be attacked through cross examination and confrontation, and who took no oath. This unseen but damning presence could not be observed on the witness stand,

[1]This Honorable Court has throughly treated this issue in Dutton v. Evans 400 U.S. 71, 91 S.Ct. 210, relied on by the Fifth Circuit in Favre.

but this declarant's statements reverberated throughout the trial. (The omission of this evidence would be especially crucial, as no other evidence linked the defendant to the murder as closely as did this uncontradicted assertion by an unknown witness. See Dutton, supra.)

James Flowers was entitled to have counsel effectively assist him in excluding the evidence of the tip which was at best triple hearsay. In failing to do so, counsel failed to preserve the defendant's "one plausible line of defense." Washington v. Strickland, supra, at 1252. The only plausible defense in the Flowers case once the confession was admitted was the defense consistent with Flowers' statement which had been allowed in evidence: that is; that he had helped an accomplice, one Olin Grant, through a window to the victim's home, and left the scene, later dividing the proceeds of the robbery with Grant. To allow into evidence a statement which implicates only James Flowers and not Olin Grant cannot be construed as consistent with any kind of defense strategy. In fact, the record is devoid of a theory of the defense. In his opening statement counsel for Mr. Flowers promised to "punch holes" in the State's case. The only attempt by counsel to deal with the tip is found in his closing argument, where counsel argued:

> You heard testimony from Officer Michel and the other people as to an anonymous phone call that there was property located in the car that James Flowers was driving that may have been taken in a burglary. That anonymous phone caller didn't say that James Flowers took it, how he got it or anything else. They said the property was in there. Is it reasonable to assume that because the property was there that James Flowers took it? Who put it in the car? Here's Detective Dunn. You saw his demeanor from the stand and his credibility and his professionalism. Did he ever ask James Flowers who put in the car, how it got in the car?
>
> Remember the statement. Quite extensive. Why didn't he ask him how the property got there.

This argument completely fails to deal with the implications of guilt and the identification of Mr. Flowers as the person who committed the crime which was the only reasonable inference the jury could have drawn from the evidence

of the tip. Favre, supra. The tip was hearsay of the rankest form. It passed through at least three police officers and its source, an unidentified caller, could have been the twentieth person to hear this story before relating it to the police.

The defendant should have been entitled to have an attorney who would formulate a theory of the defense, introduce evidence that aides in and is consistent with the defense, keep out evidence that hurts and is inconsistent with the defense and who finally would try to persuade the jury of the reasonableness of his theory. Appointed counsel did none of these things.

Counsel's failure to object to the admissibility of the evidence of the tip in effect created a witness in the courtroom whose demeanor, credibility and reliability could not be questioned. The jury must have inferred the guilt of Flowers based on this out-of-court declaration. It is obvious from the record that defense counsel knew that the tip shouldn't come in as is evidenced by his objections to its introduction based on the objectionable form of the question. However, due to his ineffectiveness, counsel did not know how to properly object to the admission of the evidence of the tip. Perhaps counsel was tired due to the trial court's insistence that on the night prior to trial all motions be held until late into the night. (TR. Vol. I, p. 6). For whatever reason, evidence of the tip may have been enough to convince one juror who otherwise may have had some doubt as to whether or not the death penalty should be imposed to vote for the death penalty based on the credibility attributed to the out of court declarant's phone call. This is critical as one vote not to impose the death penalty would have saved James Flowers' life.

Thus, it is submitted that the failure to object to this evidence served to establish Flowers' identification and guilt, amounting to a deprivation of his constitutional right to confront witnesses, and to Sixth Amendment right to the effective assistance of counsel.

I. (B) THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FAILURE OF COURT APPOINTED APPELLATE COUNSEL TO BRIEF THE ISSUES BEFORE THE LOUISIANA SUPREME COURT AMOUNTED TO A DEPRIVATION OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

Court appointed appellate counsel briefed only one issue on behalf of the

defendant before the Louisiana Supreme Court. Louisiana law provides that failure to brief an issue can result in that issue being deemed as waived. Louisiana Supreme Court Rule 7, Section 6. It is submitted that counsel's failure to adequately brief the issues on appeal deprived Mr. Flowers of his constitutional right to effective assistance of counsel, in that he was deprived of any assistance, much less effective assistance, in presenting his appeal.

CONCLUSION:

In conclusion, it is submitted that James Flowers was denied the effective assistance of counsel at the trial and appellate levels, and the right to confront witnesses at the trial level. For these reasons, petitioner prays that this writ be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX I

83-6318

SUPREME COURT OF LOUISIANA

SEP 2 1983

No. 82-KA-2621

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STATE OF LOUISIANA

versus

JAMES FLOWERS

Appeal from the Twenty-Fourth Judicial District Court
Parish of Jefferson
Honorable Jacob L. Karno, Judge

DENNIS, Justice.

Defendant, James Flowers, was convicted by a jury of first degree murder and sentenced to death upon the jury's unanimous recommendation following a sentencing hearing. In this appeal defendant advances seven assignments of error challenging his conviction and sentence. After considering the oral and written arguments of the parties and the record evidence, we conclude that the defendant's conviction and sentence must be affirmed.

1. Facts

A seventy year old widow who lived alone was brutally murdered in her home at 1500 Jefferson Street in Gretna on October 23, 1981. The physical evidence indicated that she had been severely beaten, strangled and raped during a burglary. The assailant had broken in a window and ransacked the house. Whether any of her property had been taken could not be determined immediately, however.

Blanche J concurs and will assign reasons.
Marcus, J concurs

The next day an anonymous tipster telephoned the Gretna Police Department and furnished information linking the defendant, James Flowers, with the murder. The unidentified caller asked for the police radio dispatcher by name but was told that he was on another call. Whereupon, the informant remarked that he didn't have time to wait and gave his information to another officer. According to the officer, the tip was to the effect that James Flowers, a black male, could be found in the area of Jefferson and Hamilton Streets driving a small white Chevette-type car containing one black male passenger and something taken from "that lady that was murdered on Jefferson Street yesterday". This message was given to the dispatcher who relayed it by radio to Officer Glen Michel, on patrol in the Jefferson Street area.

Officer Michel testified that he was advised by police radio to go to the 1500 block of Jefferson Street to look for a small white vehicle, possibly a Chevette or Mercury, driven by a Negro male by the name of James Flowers, who was suspected of having evidence taken during a burglary-murder which occurred the previous day at 1500 Jefferson. At this time, Michel was driving along Madison Street, parallel with Jefferson Street, one block from the murder scene. He was approaching the intersection of Madison and Cook Streets, and was about one third of a block from the corner. Ten seconds later a black male driving a white Mercury came off Jefferson Street, turned onto Cook Street, then turned onto Madison Street ahead of of Michel and came to a stop in the next block in which Madison comes to a dead end. Michel pulled through the intersection and up behind the vehicle, activated his red bar light, walked up to the white Mercury and asked the driver for his operator's license. Upon looking in the window, however, the officer saw some hand rolled marijuana

cigarettes in an ashtray by the driver's right leg. He asked the occupant to exit the vehicle and seized the cigarettes, along with four or five "dime bags" of marijuana and some costume jewelry on the floor. The officer ran a computer check on the defendant's driver's license and verified that he was James Flowers.

Although the record does not reflect that Flowers was formally advised that he was under arrest at the scene, it is clear that he effectively was arrested and taken into custody when the officer saw the marijuana and asked him to get out of the car. Following this arrest, Flowers was escorted to the Gretna Police Complex and searched by Officer Michel. The officer discovered a knife and charged the defendant, a convicted felon, with possession of a concealed weapon in violation of La. R.S 14:95.1. The defendant and all of the seized items were then delivered to Detective Dunn, the officer in charge of the murder investigation.

Detective Dunn showed the jewelry seized by Officer Michel and a necklace which Dunn removed from around the defendant's neck to members of the victim's family. The jewelry was positively identified as property of the victim. The defendant was informed that he was under investigation for aggravated burglary and first degree murder and verbally advised of his constitutional rights. The defendant waived his rights and gave a verbal statement in which he implicated himself in the burglary but contended that a confederate had entered the house and committed the murder.

Approximately five hours later, the defendant was placed under arrest for aggravated burglary, first degree murder and receiving stolen property and was again advised of his rights. Flowers, a twenty year old with an eleventh grade education, then signed a standardized waiver-of-rights

form and was interrogated by Detective Dunn. The detective typed out his questions and the defendant's responses thereto. Flowers stated that he never entered the victim's home and that his participation in the crime was limited to helping the sixteen year old codefendant gain entrance into the home. The victim's screams caused the two defendants to seek shelter along a nearby railroad track, where approximately eighty dollars was divided. Flowers told Detective Dunn that he and his confederate then parted company with Flowers returning to his home as the codefendant returned to the victim's house. Within thirty minutes the two were reunited along the railroad tracks and at this point, according to Flowers' statement, the jewelry which Officer Michel seized was given to Flowers for safe-keeping.

2. Investigatory Stop

Prior to trial defendant moved to suppress his inculpatory statements and the evidence seized from the automobile and his person, claiming that they were fruits of an illegal arrest made without probable cause. After an evidentiary hearing, the district court denied the motion to suppress without assigning reasons. The defendant reurges as an assignment of error the issues raised by the motion to suppress.

Probable cause for arrest did not exist at the time Officer Michel approached the defendant's car, but probable cause for arrest did exist once the officer sighted the marijuana cigarettes in Flowers' possession. Although the defendant argues briefly against the existence of probable cause at any time, we reject his contention because the officer testified without dispute that he immediately recognized the handrolls as marijuana cigarettes based on his experience of having made

approximately 2000 arrests for possession of marijuana. The only genuine issue raised by defendant's assignment is whether the officer's actions preceding the arrest for possession of marijuana constituted a valid investigatory stop. If the pre-arrest detention was a valid investigatory stop, the officer was not guilty of making an unlawful intrusion before he sighted the marijuana in defendant's possession. Upon sighting the illegal drugs, he would have had probable cause to arrest the defendant and seize the evidence as an incident to a valid arrest untainted by any previous unlawful intrusion.

The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. United States v. Cortez, 449 U.S. 411, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); Brownv. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676, (1969); Terry v. Ohio, 392 U.S. 1, 16-19, 88 S.Ct. 1868, 20 L.Ed.2d 889, (1968). Stopping an automobile and detaining its occupants constitute a "seizure" within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention is quite brief. Delaware v. Prouse, 44 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person, Terry v. Ohio, supra at 16, and the Fourth Amendment requires that the seizure be "reasonable." United States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975). Because of the limited nature of seizures less intrusive than a traditional arrest, however, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest. Instead, the conduct involved must be tested by the Fourth Amendment's general

proscription against unreasonable searches and seizures. Terry v. Ohio, supra at 21; Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); United States v. Brignoni-Ponce, 422 U.S. at 880-882.

In order to assess the reasonableness of such official conduct as a general proposition, it is necessary first to focus on the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interest of the private citizen, for there is no ready test for determining reasonableness other than by balancing the need to search or seize against the invasion which the search or seizures entails. Terry v. Ohio, supra at 20; Camara v. Municipal Court, 387 U.S. 523, 534-535; 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). And in justifying the particular intrusion, the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts reasonably warrant that intrusion. United States v. Brignoni-Ponce, supra at 884. The conduct of those charged with enforcing the laws is subject to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment, the facts must be judged by an objective standard: would the facts available to the officer at the moment of seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result which the United States Supreme Court has consistently refused to sanction. United States v. Cortez, supra at 417-418. And simple good faith on the part of the arresting officer is not enough. If subjective good faith alone were the test,

the protections of the Fourth Amendment would evaporate and the people would be secure in their persons, houses, papers and effects only in the discretion of the police. Terry v. Ohio, supra; Beck v. Ohio, 379 U.S. 89, 96-97, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).

Thus, there are at least three inquiries involved in determining whether a seizure was a valid investigatory stop: (a) whether the intrusion was an arrest or a stop; (b) whether the stop was of a type which is reasonable in view of the public interest served and the degree of invasion entailed; and (c) whether the particular stop was warranted by a reasonable suspicion based on specific, articulable facts and rational inferences from those facts. In the present case, this last inquiry involves the question of whether the anonymous tip was corroborated and supplemented by the officer's observations sufficiently to provide a reliable source of such specific, articulable facts and inferences.[1]

a. Whether There Was An Arrest Or A Stop.

The distinction between an arrest and a stop is crucial in many cases, for an arrest can be made only on

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[1] We are guided in this three part analysis by a number of decisions wherein the reviewing court emphasized that the detached, neutral judicial scrutiny to which police conduct is subjected involves the traditional inquiries, i.e. what is the nature of the intrusion (was it a stop or an arrest) and what were the objective facts upon which the law enforcement officer relied, as well as an examination of the governmental, or public, interest to be served. See United States v. Brignoni-Ponce, 422 U.S. at 881; 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)(Powell, J. concurring); United States v. White, 648 F.2d 29 (D.C. Cir. 1981). An implicit consideration is, therefore, the seriousness of the criminal conduct under investigation. The governmental or public interest in the prevention of serious or violent crimes, and the quick apprehension of those who commit this type of offense is generally stronger than that which exists when an individual commits, or is suspected of having committed, a nonviolent or possessory offense. This heightened public interest in the case of serious or violent crimes can tip the scales in favor of the reasonableness of the police conduct. United States v. Soyka, 394 F.2d 443 (2nd Cir. 1968); United States v. Kancso, 252 F.2d 220 (2nd Cir. 1958); See also, LaFave, Search and Seizure--A Treatise on the Fourth Amendment, § 3.2 (1978).

probable cause, while a stop is proper under the more relaxed "reasonable suspicion" standards of Terry. It is possible only to sketch some of the main features that demarcate the two types of intrusions. In Dunaway v. New York, 442 U.S. 200, 92 S.Ct. 2248, 60 L.Ed.2d 824 (1979), the high court found a stop for questioning indistinguishable from a traditional arrest because the suspect was not questioned briefly where he was, was transported to the police station, was never informed he was free to go and, in fact, would have been restrained had he tried to leave. Among the circumstances other courts have considered important to classifying the intrusion as either an arrest or a stop are: the officer's intent in stopping the citizen; the impression conveyed to the citizen as to whether he was in custody or only briefly detained for questioning; the length of the stop; the questions, if any, asked; the extent of the search, if any, made; and the amount of force, if any, used to make the stop. See, e.g., U.S. v. White, 648 F.2d 29, 34 (D.C. Cir. 1981).

Reviewing the facts of the present case in light of these considerations, we conclude that Flowers was subjected to an investigatory stop, not an arrest, before he was removed from the automobile and arrested for possession of marijuana. The officer used no weapon or physical force to restrain the defendant, but merely turned on his bar light and asked to see his driver's license - police conduct which does not normally signify or inevitably lead to an arrest. The officer did not perform a weapons search or even ask the defendant to leave the automobile before sighting the marijuana. There is no indication that the officer intended to do anything other than identify the defendant and briefly question him where

he was.[2] Nor does the record suggest that a refusal to answer questions or an attempt to leave would have led to restraint or prolonged detention. On the contrary, prior to his arrest for possesion of marijuana, the defendant was subjected to only a very brief detention without a search during which he was asked only for his operator's license.

b. Whether the Stop was of a Reasonable Type

Applying the precepts set forth above to this case, we consider first the nature and extent of the governmental interests involved. It is obvious that the public interest demands effective measures to prevent and investigate the types of violent crimes suffered by the victim in this case. The offenses involved here were not violations of mere sumptuary laws but some of the most bestial and antisocial of all crimes. Moreover, there often is no practicable alternative available to officers investigating such crimes except to insist on an encounter with the suspect. Failure to identify suspicious persons in the vicinity of a recently committed violent crime may mean the loss of the only opportunity for bringing the offender to justice.

Against this valid public interest we must weigh the interference with individual liberty that results from a brief stop for questioning. The intrusion is modest. A person stopped under such circumstances is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation. See Terry v. Ohio, 392 U.S. at 34 (White, J., concurring.) A brief

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[2] Officer Michel testified that he stopped the White Mercury Cougar "to see if the driver was named James Flowers." As in White, 648 F.2d at 34, where the officers stopped the defendant's car to "further his investigation," this case involves an officer who initially intended to question, not arrest the appellants. In both instances visual inspection of the automobile revealed narcotics which in turn gave the officer probable cause to make the arrest.

stop of a suspicious individual, in order to determine his identity or to ask him to explain suspicious circumstances, may be most reasonable in light of the facts known to the officer at the time. Adams v. Williams, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).

Because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives, we conclude that when an officer's observations, together with a substantially corroborated tip, lead him reasonably to suspect that a particular vehicle may contain evidence of a recent violent crime, he may stop the car briefly and investigate the circumstances that provoke suspicion. See Delaware v. Prouse, supra at 654; United States v. Brignoni-Ponce, supra at 881.

C. Whether the Particular Stop was Warranted

The United States Supreme Court has recognized that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to arrest or to search for contraband or evidence of crime. United States v. Brignoni-Ponce, supra at 881; Adams v. Williams, supra at 145; Terry v. Ohio, supra. Nevertheless, the Fourth Amendment requires that the detaining officer have knowledge of specific, articulable facts which, taken together with rational inferences from those facts, reasonably warrant the "stop" or "seizure." United States v. Cortez, supra; United States v. Brignoni-Ponce, supra; Terry v. Ohio, supra at 21; State v. Brown, 370 So.2d 547 (La. 1979).

An officer's knowledge of facts need not be based on his personal observations. On the contrary, an officer can, and in many situations must, act upon information

supplied by another person, be it a fellow officer or an informant. This court and the United States Supreme Court have recognized that an informant's tip can provide a police officer with reasonable cause to detain and question a suspect. Adams v. Williams, supra; State v. Wilson, 366 So.2d 1328 (La. 1978); State v. Sims, 350 So.2d 1189 (La. 1977). Informant's tips may vary greatly, however, in their value and reliability. One simple rule, or test for "reasonableness," will not cover every situation. Adams v. Williams, supra at 147.

When the state asserts the reasonableness of an investigatory stop made in response to an informant's tip the reliability of both the informant and his information must be satisfactorily demonstrated, or, if the tip is inadequate under this standard, it may be deemed sufficiently trustworthy on the basis of corroboration by independent sources. Spinelli v. United States 393 U.S. 410, 80 S.Ct. 584, 21 L.Ed.2d 637 (1969); State v. Brown, supra at 551; State v. Richards, 357 So.2d 1128 (La. 1978). This standard must be maintained as a seizure based upon an unverified or undifferentiated tip derived from an undisclosed source would be unreasonble and, consequently, unconstitutional. State v. Wilson, 366 So.2d 1328 (La. 1978).

The tip in the instant case involved a detailed and particularized description of a single individual. Defendant was described as a black male by the name of James Flowers, who would be driving a white Chevette or Mercury in the 1500 block of Jefferson Street. Additionally, the informant indicated that defendant had in his possession items taken during the burglary-murder committed at that address on the previous day.

The informant's familiarity with both the murder at 1500 Jefferson and James Flowers' plans to visit that

area significantly reduced the chances that this information was unreliable. Although a tipster could easily link Flowers with a crime based purely on rumor, it would appear unlikely that he could so accurately predict Flowers' actions without personal knowledge of his affairs. Remoter still was the possibility that a clever enemy of an innocent James Flowers would bring about his encounter with police near a murder scene merely to inconvenience him. Once Flowers appeared in the white Mercury and stopped his car about a block from 1500 Jefferson, the possibility that the informant's story was truthful and reliable became substantial and much more likely than any other hypothesis.

In this particular case there is very little chance that the tip could have been fabricated after the stop. The informant's tip was handled by two officers, with one of them making a written record of the call and the informant's statements, as the other, the dispatcher, placed a radio call into the field. Two additional officers testified that they heard the tip relayed by radio to Officer Michel.

Consequently, because of the substantial corroboration of the tip and the peculiar circumstances involved before the encounter occurred, the risks usually associated with the use of an anonymous tip, i.e., lack of informant credibility or basis of knowledge and police fabrication, were substantially reduced. See generally LaFave, supra, § 9.3. Accordingly, we conclude that the information was sufficiently reliable and afforded the officer specific, articulable facts which, taken together with rational inferences, justified the temporary stop of defendant for questioning.

The motion to suppress was correctly denied and the assignment of error based on this ruling is without merit.

The remaining issues relate to the penalty phase of the bifurcated trial.

3. Failure to Define Mitigation

In his first assignment of error the defendant contends that the trial judge committed reversible error as he violated defendant's constitutional rights through his failure to explain clearly what statutory mitigating circumstances are and their function in the jury's sentencing deliberations. La.C.Cr.P. art. 905.5. The thrust of the defense's argument is that the phrase "mitigating circumstances" is a term of art which should have been defined by the judge. Counsel argues that the judge should have advised the jury that "mitigating circumstances" are "circumstances which do not justify or excuse an offense, but which, in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability and punishment," citing Spivey v. Zant, 661 F.2d 464, 471, n. 8 (5th Cir. 1981).

The federal cases to which counsel for defendant has directed our attention do not require that the jury be given definitions of the concept of "mitigating circumstances." The jury must receive clear instructions which not only do not preclude consideration of mitigating factors, Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), but which inform the jury of its duty and authority to consider the qualities and characteristics of the individual offender and the circumstances of the particular offense. Spivey v. Zant, supra.

We find that the trial judge clearly and concisely instructed the jury on mitigation and its authority to recommend against death. The judge read Code of Criminal Procedure article 905.5 to the jury, emphasized to the jury its authority to consider any other relevant circumstances, and handed the jury a copy of the lists of aggravating and

mitigating circumstances. Any further attempt to define or expand upon statutory mitigating circumstances may only lead to juror confusion and further efforts to define the definitions. Compare, e.g., State v. McDaniel, 410 So.2d 754 (La. 1982)(noting the traps for an unwary trial court attempting to define "reasonable doubt.") Based on the instructions given, the jury could properly exercise its role as finder of fact.

This argument appears to lack merit.

4. Weighing the Circumstances

In assignment number two the defendant argues that the trial judge failed to instruct the jury to find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances prior to recommending the death sentence and, therefore, committed error.

This court has recently considered and rejected this argument. State v. Welcome, ___ So.2d ___ (La. 1983), No. 82-KA-2232. The law of this state, La.C.Cr.P. art 905.3 requires that the jury find unanimously and beyond a reasonable doubt the existence of at least one statutorily defined "aggravating circumstance." Having found a statutory aggravating circumstance, the jury is required to consider evidence of any mitigating circumstances, and to weigh it against the statutory aggravating circumstance so found, before recommending that the sentence of death be imposed. State v. Willie, 410 So.2d 1019, 1033 (La. 1982). Our statute is modeled upon the one approved by the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

This assignment has no merit.

5. Irrelevant Aggravating Circumstances

By this assignment of error, the defendant argues that the trial judge committed reversible error at the

sentencing phase when he instructed the jury on aggravating circumstances under La.C.Cr.P. art. 905.4 that had no possible evidentiary basis in the record.

In his instructions to the jury the trial judge read the lists of aggravating and mitigating circumstances, C.Cr.P. arts. 905.4 and 905.5 and then stated:

> The fact that you are given a list of aggravating circumstances should not cause you to infer that the Court believed that any of the circumstances do or do not exist.
>
> The law requires that the jury be given such a list in every case.
>
> Whether any aggravating or mitigating circumstances exists is a fact for you to determine based upon the evidence presented.
>
> In addition to the evidence presented at this sentence hearing--sentencing hearing in deciding the sentence to be imposed you may consider evidence presented during the guilt determination of the trial.

Defense counsel contends that when the trial judge instructed the jury on the admittedly extraneous aggravating circumstances, i.e. that the victim was a fireman or peace officer, the defendant was a hired killer, the defendant was imprisoned at the time of the murder, or that the victim was a correctional officer or an employee of the Louisiana Department of Corrections, he failed to properly guide and focus the jury's deliberations as is required by the Eighth and Fourteenth Amendments. See Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

We can find no reversible merit in counsel's argument. The court clearly instructed the jury that it must review the evidence before it and determine which, if any, of the aggravating circumstances was proven beyond a reasonable doubt to exist. The trial judge did not tell the jury to disregard the aggravating circumstances which obvivously could not be found to exist, but such instructions are implicit in the ones given. Furthermore,

we cannot accept counsel's agrument as it suggests that a judge, with the aid of counsel, should review the nine aggravating circumstances and instruct the jury only as to the ones supported by the evidence at trial. While such a procedure is permissible and desirable, it is not required constitutionally or statutorily.

This assignment has no merit.

6. Double Jeopardy

By assignment of error No. 4, the defendant argues that our capital punishment scheme, under which the same felony may form the basis of an essential element of the crime and an aggravating circumstance for consideration by the jury in recommending a sentence, constitutes a denial of the guarantee against double jeopardy. The double jeopardy clauses embrace three separate rules prohibiting (1) reprosecution for the same offense following acquittal, (2) reprosecution for the same offense following conviction, and (3) multiple punishment for the same offense. North Caroline v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); State v. Chaisson, 425 So.2d 745 (La. 1983). The capital punishment system does not permit or promote a violation of any of these rules and therefore does not violate the double jeopardy clauses. Moreover, the essence of the defendant's attack, although articulated differently, has been considered and rejected by this court before. See State v. Knighton, ___ So.2d ___, 82-KA-0097 (La. 1983)(aggravating circumstances consist only of the elements of the crime); State v. Clark, 387 So.2d 1124 (La. 1980), cert. denied, 449 U.S. 1103 (1981).

7. Appellate Review of Sentencing

Through these assignments of error the defendant contends that Louisiana's system of appellate review to insure evenhanded disposition of cases imposing the death

penalty is constitutionally flawed in not mandating statewide review of the sentence imposed in similar cases. This court previously considered the question and a majority decided that proportionality review of death sentences within a judicial district, rather than on a statewide basis, passes constitutional muster. State v. Prejean, 379 So.2d 240 (La. 1979), cert. denied, 449 U.S. 891 (1980). See also Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982); Baldwin v. Blackburn, 653 F.2d 942 (5th Cir. 1981).

Capital Sentence Review

Every sentence of death imposed in this state is reviewed by this court to determine if it is constitutionally excessive. In making this examination, the court determines whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factors, whether the evidence supports the jury's findings of a statutory aggravating circumstance, and whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. La.C.Cr.P. art. 905.9.

A. Aggravating Circumstances

As noted above, in discussion of assignment number four, the jury found and listed five aggravating circumstances. La.C.Cr.P. art. 905.4 and 905.7. We have reviewed the record with respect to three of the aggravating circumstances and conclude that the evidence is sufficient to support a reasonable jury's findings beyond a reasonable doubt of these aggravating circumstances.

The jury found that the offender was engaged in the perpetration of aggravated rape. La.C.Cr.P. art. 905.4(a). Aggravated rape includes nonconsensual anal or vaginal sexual intercourse committed where the victim resists the act to the utmost, but is overcome by force, or

where the victim is prevented from resisting the act by threat of great and immediate bodily harm. La. R.S. 14:42. The record supports a finding beyond a reasonable doubt that James Flowers had sexual intercourse with the victim, a seventy year old widow, and that the victim did not give her lawful consent. The evidence before this court, which included photographs of the victim's bruised and bloodied body and the autopsy report which indicates that the victim died of a brain hemorrhage, supports the jury's conclusion that the victim resisted the act to the utmost or was prevented from resisting by Flower's threats of great and immediate bodily harm.

The jury found that the offender was engaged in the perpretration of aggravated burglary. La.C.Cr.P. art. 905.4(a). Aggravated burglary includes the unauthorized entering of a structure where a person is present, with the intent to commit a felony or a theft therein, when the offender commits a battery upon any person while in such place. La. R.S. 14:60. The evidence before the jury clearly establishes that James Flowers unauthorizedly entered the victim's home with the intent to commit a theft. The evidence further establishes that he battered the seventy year old woman while he was inside of her home. The evidence, therefore, clearly supports the jury's finding of the aggravated burglary aggravating factor beyond a reasonable doubt.

The jury found that the offense was committed in an especially heinous, atrocious or cruel manner. La.C.Cr.P. art. 905.4(g). This court has held that in order for the jury to conclude that the offense was committed under this aggravating circumstance there must exist evidence, from which the jury could find beyond a reasonable doubt, that there was torture or the pitiless infliction of unnecessary pain on the victim. State v.

Sonnier, 402 So.2d 650 (La. 1981). Madeline Malmstron, the seventy year old victim, was severely beaten about the head and face, strangled and raped. Patterned abrasions and bruises on her neck were later matched up to the patterns in the soles of the defendant's tennis shoes. The victim's jaw was broken, several teeth were knocked loose, and she suffered at least three broken ribs. Serious physical abuse of the victim before death, such as that which this victim suffered constitutes torture. The jury's finding that the homicide was committed is an especially heinous, atrocious or cruel manner is supported by the evidence.

This court has taken the position that where more than one statutory aggravating circumstance is found by the jury, the state's failure to prove the other aggravating circumstances found by the jury does not invalidate the aggravating circumstances determined and the sentence of death based thereon. State v. Antonio James, 431 So.2d 399 (La. 1983). Consequently, it is not necessary for us to consider whether the evidence supports the jury's other findings of statutory aggravating circumstances. State v. Mattheson, 497 So.2d 1150 (La. 1981).

B. Passion, Prejudice or Arbitrariness

Although the defendant is a black man and the victim was a white female, the record is devoid of any evidence that racial prejudice was a factor in the imposition of the death penalty. Our review of the record and of applicable law convices us that this death penalty was not imposed arbitrarily or without reason or out of local passion.

C. Proportionality of Sentence

The final focus of this Court's sentence rewiew in a capital case is a determination of whether the sentence in the instant case is disproportionate to the penalty

imposed in similar cases in the same parish. Both the crime and the defendant must be considered.

Pursuant to Supreme Court Rule 28 § 4, the state filed a sentence review memorandum which listed the twenty-two first degree murder cases in the Twenty-Fourth Judicial District in which sentence was imposed after January 1, 1976. The death penalty was imposed in six of these cases.

A comparison of the sentence in this case to sentences in other first degree murder prosecutions shows that it is not a disproportionate sentence. The instant offense was committed without provocation and in a particularly brutal manner in that the defendant beat his victim, breaking her jaw and several ribs, and raped her before killing her. Juries in the Twenty-Fourth Judicial District have recommended the death penalty in other cases involving crimes committed in such a senseless, brutal fashion as the instant murder was committed.

DECREE

For these reasons the defendant's conviction and sentence of death are affirmed.

AFFIRMED.

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[3]State v. Sawyer, 422 So.2d 95 (La. 1982); State v. Taylor, 422 So.2d 109 (La. 1982); State v. Robinson, 421 So.2d 229 (La. 1982).

APPENDIX 2

Supreme Court of Louisiana

NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE # 128

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 18th day of November, 1983, the following action was taken by the Supreme Court of Louisiana, composed of Chief Justice John A. Dixon, Jr., and Associate Justices Pascal F. Calogero, Jr., Walter F. Marcus, Jr., James L. Dennis, Fred A. Blanche, Jr., Jack Crozier Watson, and Harry T. Lemmon, in the cases listed below:

REHEARING GRANTED:

82-KA-1775 State v. John Vaughn

REHEARINGS DENIED:

82-C-0306 Lafayette Parish School Board v. Market Leasing Co., Inc.

82-B-0739 Louisiana State Bar Association v. W. D. Atkins, Jr.
BLANCHE, WATSON & LEMMON, J.J., would grant a rehearing.

82-KA-1114 State v. Ramus J. Benoit, Jr.

82-KA-1422 State v. Tina Walters and Janice Chatman
WATSON, J., would grant a rehearing.

82-KA-1788 State v. James Craig Moore
DIXON. C.J., CALOGERO & DENNIS, J.J., would grant a rehearing.

82-KA-1820 State v. John Schilling

82-B-2024 Louisiana State Bar Association v. Ronald L. Causey
LEMMON, J., would grant and order reprimand.

83-CQ-0581 Don Aguillard, et al v. David C. Treen, et al
DIXON, C.J., WATSON & LEMMON, J.J., would grant a rehearing.

MOTION TO FILE OUT-OF-TIME APPLICATION FOR REHEARING IS GRANTED. ON CONSIDERATION OF APPLICATION IT IS DENIED:

82-KA-2621 State v. James Flowers, alias James Rose

APPENDIX 3

Supreme Court of the United States

No. A-545

JAMES FLOWERS,

Petitioner,

v.

LOUISIANA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 16, 1984.

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 9th day of January, 1984.

APPENDIX 4

STATE OF LOUISIANA
VERSUS
JAMES FLOWERS A/K/A
JAMES ROSE

24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA
NUMBER: 81-3950 DIVISION "J"

FILED: January 25, 1984

DEPUTY CLERK OF COURT

WARRANT FOR EXECUTION OF PERSON CONDEMNED

TO: HONORABLE JOHN T. KING
SECRETARY OF THE DEPARTMENT OF CORRECTIONS
STATE OF LOUISIANA
DEPARTMENT OF CORRECTIONS
BATON ROUGE, LOUISIANA

WHEREAS, IT APPEARS FROM THE ANNEXED DULY CERTIFIED COPY OF THE INDICTMENT, VERDICT, INCLUDING THE FINDING OF GUILT, JURY RECOMMENDATION, SENTENCE AND THE JUDGMENT OF THE SUPREME COURT OF LOUISIANA AFFIRMING THE SENTENCE OF DEATH, THAT A SESSION OF THE HONORABLE, THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA, AND HELD BEGINNING ON THE SECOND DAY OF FEBRUARY, 1982, JAMES FLOWERS, A/K/A JAMES ROSE WAS CONVICTED ON THE FIFTH DAY OF FEBRUARY 1982, OF THE CRIME OF FIRST DEGREE MURDER IN VIOLATION OF LA. R.S. 14:30, AND THAT ON THE FIFTH DAY OF FEBRUARY, 1982, THE JURY UNANIMOUSLY RECOMMENDED THAT SAID DEFENDANT BE SENTENCED TO DEATH AND UNANIMOUSLY FOUND THE FOLLOWING AGGRAVATING CIRCUMSTANCES, TO-WIT: (1) "PERPETRATION OF AGGRAVATED RAPE"; (2)"PERPETRATION OF AGGRAVATED BURGLARY"; (3)"PERPETRATION OF ARMED ROBBERY"; (4) "SIGNIFICANT PRIOR HISTORY OF CRIMINAL ACTIVITY"; (5) "THE OFFENSE WAS COMMITTED IN AN ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL MANNER"; AND IN ACCORDANCE WITH THE SAID RECOMMENDATION OF THE JURY, HIS HONOR, JACOB L. KARNO, OF SAID COURT, SENTENCED THE SAID JAMES FLOWERS A/K/A JAMES ROSE TO DEATH ON FEBRUARY 25,1982; AND THAT SAID CONVICTION AND SAID SENTENCE OF DEATH HAS BEEN FINALLY AFFIRMED BY THE SUPREME COURT OF LOUISIANA.

NOW, THEREFORE, I JACOB L. KARNO, JUDGE OF THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, BEING THE COURT OF ORIGINAL JURISDICTION, BY VIRTUE OF THE ORDER OF THE SUPREME COURT OF LOUISIANA, DATED SEPTEMBER 2, 1983, IN ACCORDANCE WITH LA. R.S. 15:567, DO HEREBY DIRECT AND COMMAND YOU TO CAUSE THE EXECUTION OF JAMES FLOWERS A/K/A JAMES ROSE, THE PERSON CONDEMNED IN ALL THINGS ACCORDING TO THE JUDGMENT AND SENTENCE OF SAID

COURT AND THE LAW IN ALL SUCH CASES MADE AND PROVIDED, ON ~~26th~~ 4th DAY OF ~~May~~ March THE 26th DAY OF MARCH, 1984, BE ELECTROCUTION, BETWEEN THE HOURS OF 12:00 O'CLOCK MIDNIGHT AND 3:00 A.M. SAID EXECUTION SHALL TAKE PLACE AT THE LOUISIANA STATE PENITENTIARY AT ANGOLA, IN A ROOM ENTIRELY CUT OFF FROM VIEW OF ALL EXCEPT THOSE PERMITTED BY LAW TO BE IN SAID ROOM. SAID EXECUTION SHALL TAKE PLACE IN THE PRESENCE OF THE WARDEN OF THE LOUISIANA STATE PENITENTIARY AT ANGOLA, OR A COMPETENT PERSON SELECTED BY HIM, THE CORONER OF THE PARISH OF WEST FELICIANA, OR HIS DEPUTY, AND A PHYSICIAN SUMMONED BY THE WARDEN OF THE LOUISIANA STATE PENITENTIARY AT ANGOLA, THE OPERATOR OF THE ELECTRIC CHAIR, WHO SHALL BE A COMPETENT ELECTRICIAN WHO SHALL HAVE NOT BEEN PREVIOUSLY CONVICTED OF A FELONY, A PRIEST OR MINISTER OF THE GOSPEL, IF THE CONVICT SO REQUEST, AND NOT LESS THAN FIVE NOR MORE THAN SEVEN OTHER WITNESSES, ALL CITIZENS OF THE STATE OF LOUISIANA; NO PERSON UNDER THE AGE OF EIGHTEEN YEARS SHALL BE ALLOWED WITHIN SAID EXECUTION ROOM DURING THE TIME OF EXECUTION. WHEN THE SENTENCE SHALL HAVE BEEN EXECUTED, THE WARDEN OF THE LOUISIANA STATE PENITENTIARY AT ANGOLA, OR HIS DEPUTY PERFORMING THE EXECUTION, SHALL MAKE A PROCESS VERBAL OF SAID EXECUTION IMMEDIATELY THEREAFTER, WHICH PROCESS VERBAL SHALL RECITE THE MANNER AND DATE OF SAID EXECUTION AND SHALL BE ATTESTED BY SAID WARDEN, OR HIS DEPUTY, AND BY ALL OF THE WITNESSES, AND SAID PROCESS VERBAL, WHEN SO SIGNED, SHALL BE FILED WITH THE CLERK OF COURT OF THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, TOGETHER WITH THE ANNEXED DULY CERTIFIED COPY OF THE PROCEEDINGS HAD IN SAID CASE, AND ALL TO BE IN ACCORDANCE WITH LAW, AND FOR ALL OF WHICH THIS SHALL BE YOUR WARRANT AND AUTHORITY.

A CERTIFIED COPY OF THIS WARRANT SHALL BE MAILED BY THE CLERK OF COURT OF THE PARISH OF JEFFERSON TO THE GOVERNOR OF THE STATE OF LOUISIANA, RETURN RECEIPT REQUESTED, AND THE RETURN RECEIPT SHALL BE FILED IN THE RECORD OF THESE PROCEEDINGS UPON ITS RETURN TO THE SAID CLERK OF COURT.

UPON RECEIPT OF THIS WARRANT THE SECRETARY OF THE DEPARTMENT OF CORRECTIONS SHALL CAUSE A COPY OF SAID WARRANT TO BE DELIVERED TO THE PERSON CONDEMNED.

GIVEN UNDER MY SIGNATURE AND THE SEAL OF THE TWENTY-FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, LOUISIANA, AND THUS DONE, RENDERED, READ, SIGNED AND ORDERED IN OPEN COURT IN THE CITY OF GRETNA, PARISH OF JEFFERSON, STATE OF LOUISIANA, ON THIS Wednesday, 25th DAY OF January 1984.

DISTRICT JUDGE

A TRUE COPY OF THE ORIGINAL ON FILE IN THIS OFFICE

DEPUTY CLERK
24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, LA.

CORRECTED ORDER - January 27, 1984

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA, EX REL
JAMES FLOWERS

VS NO. 84-KP-0185

JOHN T. KING, SECRETARY OF DEPARTMENT
OF CORRECTIONS, AND ROSS MAGGIO,
WARDEN, STATE PRISON

- - - -

In Re: James Flowers, applying for Stay Order,
24th Judicial District Court, Parish
of Jefferson, No. 81-3950.

- - - -

January 26, 1984

Granted. In view of the fact that the U. S. Supreme Court has granted relator until February 16, 1984 to file a petition for review, all proceedings in this case, including execution of sentence are stayed pending timely filing and final disposition of the petition in the U. S. Supreme Court.

JAD

PFC

WFM

FAB

HTL

Supreme Court of Louisiana
January 26, 1984.

Clerk of Court
For the Court

IN THE

SUPREME COURT

COPY

STATE OF LOUISIANA

NO. 82-KA-2621

STATE OF LOUISIANA,

APPELLEE

VS.

JAMES FLOWERS,

APPELLANT

APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, NO. 81-3950, DIVISION "J", THE HONORABLE JACOB L. FARNO, JUDGE

ORIGINAL BRIEF ON BEHALF OF JAMES FLOWERS, APPELLANT

DELIVERED BY HAND

SUPREME COURT OF LOUISIANA
FILED MAR 15 1983

CLERK

MARTHA E. SASSONE
Staff Appeals Counsel
24th Judicial District
Indigent Defender Board
P.O. Box 9
Gretna, La. 70054
Phone: 366-4569

TABLE OF AUTHORITIES

CASE LAW

Lockett v. Ohio, 438 U.S. 586 (1978)

Chenault v. Stynchocombe, 581 F. 2d 444 (5th Cir. 1979)

Spivey v. Zant, 661 F. 2d 464 (5th Cir. 1981)

Gregg v. Georgia, 428 U.S. 153 (1976)

Eddings v. Oklahoma, 40 U.S.L.W. 4161 (Jan. 19, 1982)

CONSTITUTIONAL LAW

14th Amendment, U.S. Constitution

8th Amendment, U.S. Constitution

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE.....	1
ARGUMENT I.....	2
CONCLUSION.....	5
CERTIFICATE.....	5

STATEMENT OF THE CASE

James Flowers was charged with a violation of La. R.A. 14:30, first degree murder. He was convicted and sentenced to death.

It is from this conviction and sentence that defendant appeals

ARGUMENT I

THE TRIAL JUDGE'S SENTENCING INSTRUCTIONS AT APPELLANT'S TRIAL VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENT BECAUSE THEY FAILED TO EXPLAIN CLEARLY WHAT MITIGATING CIRCUMSTANCES ARE AND THEIR FUNCTION IN THE JURY'S SENTENCING DELIBERATIONS.

At the end of the sentencing hearing, the trial judge instructed the jury on aggravating and mitigating circumstances. The judge's instructions on mitigating circumstances failed, however, to explain what mitigating circumstances are and what their functio is in the jury's sentencing deliberations. This failure to clearly and explicitly instruct the jury on mitigating circumstances rendered the instructions at sentencing constitutionally inadequate under the Eighth and Fourteenth Amendments.

The Eighth and Fourteenth Amendments require that the sentencing in a capital case "not be precluded from considering as a mitigating factor any aspect of a defendant's character or record. . . " Lockett v. Ohio, 438 U.S. 586, 604 (1978). See also Bell V. Ohio, 438 U.S. 637 (1978) and Eddings v. Oklahoma, 50 U.S. L.W. 416 (Jan. 19, 1982). To fulfill this requirement, a judge at the sentening phase of a capital trial must "clearly instruct the jury about mitigating circumstances and the option to recommend against death" Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978).

In Chenault, the 5th Circuit stated that the sentencing jury must receive an explanation of what a mitigating circumstance is and its function during sentencing deliberations. Otherwise, "consideration of mitigating circumstances would have no importance. . if the sentencing jury is unaware of what it may consider in reaching its decision." Chenault v. Stynchcombe, supra, 581 F.2d at 448.

The specific question of what instructions on mitigating circumstances are required by the Eighth and Fourteenth Amendments was addressed in Spivey v.Zant, 661 F.2d 464(5th Cir. 1981). The court emphasized in Spivey that jury instructions on mitigating circumstances must be very clear and explicitly designed to guide and focus the jury's consideration of mitigating factors "this will mean that the judge must clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death; in order to do so the judge will normally tell the jury what

a mitigating circumstance is and what its role is in the jury's sentencing deliberations." Spivey v. Zant, supra, 661 F. 2d at 471. These instructions must advise the jurors of the meaning of mitigating circumstances in words that are comprehensible to lay persons.

Jury instructions that fail to instruct the jury clearly about mitigating circumstances and the option to recommend against death are unconstitutional because they do not "minimize the risk of wholly arbitrary and capricious action" and fail to circumscribe the jury's discretion. Gregg v. Georgia, 428 U.S. 153, 188(1976). Incomplete jury instructions run the risk of not meeting one of the primary goals of a constitutional death penalty statute: ensuring "that the sentencing authority is given adequate information and guidance." Gregg v. Georgia, id at 195.

In the case at bar, the instructions given on mitigating circumstances fail to meet the stringent Eighth and Fourteenth Amendment standards. The charge to the jury gave no explanation of the nature and function of mitigating circumstances. The jurors were merely read a list of seven statutory factors that are "considered" mitigating circumstances and were further told that they could consider "any . . . relevant mitigating circumstances." However, they were not given any information or instructions on what mitigating circumstances are or how they were to be"considered during deliberations. Indeed, the jury was not even advised of the definition of mitigate or of the common elements or factors that rendered the seven statutory examples mitigating. No where in the instructions does the judge advise the jury that mitigating circumstances are "circumstances which do not justify or excuse the offense, but which, in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability and punishment. . . " Spivey v. Zant, supra 661 F.2d at 471, note 8. Without the explanatory imformation required by Spivey, and set forth in Black's Law Dictionary as the legal definition of this "term of art" in a capital trial, the jury could not be expected to extract mitigating circumstances from the facts they heard at trial. In the highly technical area of capital punishment law, where the obligation of state courts to provide appropriate guidanc

for the consideration of mitigating circumstances has been repeated emphasized, Lockett v. Chio, supra has been repeatedly emphasized, Lockett v. Ohio, supra, Eddings v. Oklahoma, supra, the trial court failure to explain or define, in a clear and proper manner the nature of mitigation is constitutionally intolerable.

Finally, the instructions also fail to explain to the jury how mitigating circumstances function in the jury's sentencing deliberations. Specifically, as required by Chenault, the jurors were never specifically informed that these are facts that may persuade them to exercise their "opiton" to recommend against death Clearly, the instructions that were read to appellant's jury failed to communicate what mitigating circumstances are and what their function is during the jury's deliberations.

In sum, the charge to the jury at appellant's capital trial failed to constitutionally guide and focus the jury's consideration since the instructions never described what the nature is of a mitigating circumstance or its function during the jury's sentencing deliberations. Also, the charge did not begin to communicate to the jury in any explicit or clear manner that "the law recognize the existence of circumstances which do not justify or excuse the offense, but which in fairness or mercy may be considered as extenuating or reduces the degree of . . . punishment," a message that is mandated by the Eighth and Fourteenth Amendment. Spivey v. Zant, supra, 661 F.2d at 471. This court should, therefore, vacate appellant's death sentence and order a new sentencing hearing at which the sentencing jury is instructed on mitigating circumstances in accordance with the dictates of the Federal Constitution.

CONCLUSION

For the foregoing reasons appellant respectfully requests that his conviction be reversed and the death sentence vacated.

MARTHA E. SASSONE
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Indigent Defender Board
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Phone: 366-4569

CERTIFICATE

I hereby certify that a copy of the above and foregoing brief has been served upon the District Attorney for the Parish of Jefferson this 14th day of March, 1983.

MARTHA E. SASSONE

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED
FEB. 16, 1984
FEB 21 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO 83-6318

JAMES FLOWERS,

Petitioner

VERSUS

STATE OF LOUISIANA

Respondent

AFFIDAVIT OF MAILING

Before me, the undersigned Notary, personally came and appeared Robert Glass, a member of the Bar of this Court, and Frank G. DeSalvo and Michele Gaudin, attorneys for James Flowers who averred that the Petition For Writ of Certiorari and accompanying documents in the captioned matter were properly posted at the United States Post Office, in New Orleans, Louisiana directed to the Clerk of the United States Supreme Court on this 16th day of February, 1984.

ROBERT GLASS

FRANK G. DeSALVO

MICHELE GAUDIN

Sworn to and subscribed before me this 16th day of February, 1984.

PATRICK D. McARDLE, NOTARY PUBLIC

IN THE
SUPREME COURT OF THE UNITED STATES

NO: 83-6318

JAMES FLOWERS,
Petitioner

versus

STATE OF LOUISIANA,
Respondent

RECEIVED
FEB 21 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

The petitioner, James Flowers, who is now held in the Louisiana State Penitentiary at Angola, Louisiana, on Death Row, asks leave to file the attached petition for a Writ of Certiorari to the Supreme Court for the State of Louisiana without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 of the Rules of this Court.

On or about January 24, 1984, counsel asssumed the responsibility to represent the petitioner, without a fee, for the purpose of preparing and presenting the attached petition. Petitioner was represented by appointed counsel at both the state District Court and Supreme Court levels.

The petitioner's affidavit in support of this motion is attached hereto.

DeSALVO & McARDLE
614 Tchoupitoulas Street
New Orleans, Louisiana 70130
(504)524-4191

BY: Michele Gaudin
MICHELE GAUDIN

ATTORNEY FOR
JAMES FLOWERS

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

NO.

JAMES FLOWERS
Petitioner

VS.

STATE OF LOUISIANA
Respondent

Affidavit in Support of Motion
To Proceed in Forma Pauperis

I, James Flowers being first duly sworn according to the law, depose and say, in support of my motion for leave to proceed without being required to prepay costs of fees: (1) I am the petitioner in the above entitled case; (2) because of my poverty I am unable to pay the costs of said case; (3) I am unable to give security for the same; (4) I believe that I am entitled to the redress I seek in said case.

I was sentenced to a State penitentiary by a District Court for the Parish of Jefferson, Louisiana on a charge of first degree murder. I am still serving my sentence and therefore have no current employment, nor have I received income in the past year. I have no savings or checking accounts and no longer own any valuable property. No persons are dependent on me for support.

I understand that a false statement on this affidavit will subject me to penalties of perjury.

James Lee Flowers
JAMES FLOWERS

SWORN TO AND SUBSCRIBED before me this 8 day of 84, 1984 at Angola, Louisiana.

Clovis Tillery
NOTARY PUBLIC